Nos. 78-802 and 78-803

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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RAY K. BULLOCK, PETITIONER

*v.*

UNITED STATES OF AMERICA

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CORNELIUS J. KEHOE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## CITATIONS

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## OPINIONS BELOW

The opinion of the court of appeals reinstating the indictment on the government's appeal (Pet. App. 59-

79)[1] is reported at 516 F.2d 78. The opinion of the court of appeals after trial (Pet. App. 20-42) is reported at 573 F.2d 335. The opinion of the court of appeals on rehearing (Pet. App. 43-44) is reported at 579 F.2d 971.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 45-46) was entered on September 5, 1978. Petitions for rehearing were denied on October 16, 1978 (Pet. App. 47). The petitions for a writ of certiorari were filed on November 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district judge's ruling terminating petitioners' first trial resolved factual elements of the offense and therefore constituted an "acquittal" barring further prosecution.

2. Whether the Double Jeopardy Clause bars further prosecution after a trial is terminated by a ruling, at a defendant's request, that the indictment fails to state an offense.

3. Whether, after a trial is terminated by a ruling that the indictment is fatally defective, the government must successfully appeal that ruling before it may bring the defendant to trial under a valid indictment.

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[1] All references to "Pet. App." refer to the appendix in No. 78-802.



## STATUTES INVOLVED

18 U.S.C. 657, which provides in pertinent part:

> Whoever, being * * * connected in any capacity with * * * any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, * * * shall be fined * * * or imprisoned * * * or both.

18 U.S.C. 1006, which provides in pertinent part:

> Whoever, being * * * connected in any capacity with * * any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * * with intent to defraud the * * * institution, * * * participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such * * * institution, * * * shall be fined * * * * * * or imprisoned * * * or both.

## STATEMENT

In 1973, petitioners were indicted in the United States District Court for the Southern District of Texas on a charge of having "embezzled .3082 acres of land" in violation of 18 U.S.C. 657, which makes illegal the embezzlement of "moneys * * * or other things of value" from institutions insured by the Federal Savings and Loan Insurance Corporation. After the government had presented its case-in-chief,

petitioners for the first time objected to the charge on the ground that real property cannot be embezzled under Section 657. They moved for a judgment of acquittal, and the district court granted the motion, holding that under the terms of the statute embezzlement applies only to personal property, not real property, and concluding that the indictment therefore "failed to state an offense against the United States" (Pet. App. 48-58; 365 F.Supp. 920).

Shortly thereafter a new indictment was returned, based on the same conduct. The new indictment charged petitioners with fraudulently receiving the benefit of a transaction by a federally insured savings association with which they were connected, in violation of 18 U.S.C. 1006. The district court dismissed the second indictment prior to trial on the ground that a trial on the indictment would violate the Double Jeopardy Clause of the Fifth Amendment. On the government's appeal, the Fifth Circuit reversed. Finding it significant that petitioners had "for reasons of trial tactics" delayed their objection to the first indictment until after jeopardy had attached, the Fifth Circuit reinstated the indictment (Pet. App. 59-79). *United States* v. *Kehoe*, 516 F.2d 78 (5th Cir. 1975), cert. denied, 424 U.S. 909 (1976).

A jury trial was then held, and petitioners were convicted of violating Section 1006. The evidence, which is set forth in detail in the opinion of the court of appeals (Pet. App. 22-28), showed that from 1969 through 1971 petitioners served as directors of the Surety Savings Association, a federally insured savings and loan institution (Pet. App. 21-22). During that period, they engaged in a complex series of financial maneuvers designed to reap personal profit from the sale of a parcel of land owned by the savings association. Following their convictions, each petitioner was placed on three years' probation.



On appeal, the Fifth Circuit rejected petitioners' "allegations of error concerning the merits of the conviction" (Pet. App. 25), but it held that under *United States* v. *Jenkins*, 420 U.S. 358 (1975), their convictions violated the Double Jeopardy Clause. On the government's petition for rehearing, the court of appeals reversed itself and affirmed petitioners' convictions, taking note of the fact that the intervening decision of this Court in *United States* v. *Scott*, No. 76-1382 (June 14, 1978), had expressly overruled *Jenkins*.

## ARGUMENT

Although petitioners seek to raise several related issues under the Double Jeopardy Clause, the only question squarely presented by this case is whether the district court's order terminating petitioners' first trial was an "acquittal" for double jeopardy purposes. Two panels of the court of appeals have held that the order was not an acquittal, and under the analysis employed in the pertinent decisions of this Court, that holding is correct and does not warrant further review.

1. Petitioner Bullock argues (Pet. 6-14) that the trial court's entry of what it characterized as a

"judgment of acquittal" during the course of the first trial (on the alleged violation of Section 657) resolved factual elements of the offense and was thus an "acquittal" within the meaning of the Double Jeopardy Clause, barring further prosecution. See, *e.g.*, *United States* v. *Scott*, *supra*, slip op. 8; *Sanabria* v. *United States*, No. 76-1040 (June 14, 1978); *United States* v. *Ball*, 163 U.S. 662 (1896).

It is settled, however, that the word "acquittal" has "no talismanic quality for purposes of the Double Jeopardy Clause" (*Serfass* v. *United States*, 420 U.S. 377, 392 (1975)) and that "the trial judge's characterization of his own action cannot control the classification of the action" (*United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971)). Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Scott*, *supra*, slip op. 14; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Here, the trial court made no such resolution. Instead, the court held only that the indictment, which charged embezzlement of land, was legally insufficient to charge an offense, because only personal property can be the subject of embezzlement under Section 657 (see Pet. App. 48-56). Thus, the indictment was fundamentally defective and could not support a conviction under any view of the facts. See *Lee* v. *United States*, 432 U.S. 23 (1977); *Illinois* v. *Somerville*, 410 U.S. 458 (1973). As the court of appeals held in its



initial opinion in this case, the district judge was "clearly discussing only the legal sufficiency of the indictment and not the facts of the case before him" (Pet. App. 64).[2]

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[2] The court noted that "one brief passage" of the district court's opinion suggested the contrary. Petitioner relies heavily on that passage, in which the district court stated (78-802 Pet. 7-8):

> This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for the purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of embezzlement.

The court of appeals properly rejected petitioners' claim that this passage rendered the trial court's ruling an "acquittal" (Pet. App. 65-66). It held that the government was essentially correct in its contention that "this passage was simply a hypothetical situation posited by the trial judge in which the defendants could properly have been indicted under 18 U.S.C. § 657" (Pet. App. 65). The trial court did not indicate in its opinion that any indictment alleging embezzlement of land would have been proper under any evidence. The court of appeals' subsequent opinions did not alter this assessment of the character of the trial court's ruling terminating the first trial (see Pet. App. 20-46), and this determination does not warrant further review by this Court.

This Court's decisions in *Fong Foo* v. *United States*, 369 U.S. 141 (1962), and *Sanabria* v. *United States*, *supra*, upon which petitioner Bullock relies (Pet. 10-14), do not support his contention that further proceedings in this case were constitutionally barred following the termination of his first trial. While *Fong Foo* and *Sanabria* establish that a verdict of acquittal bans further proceedings against the defendant, they do not suggest that an order terminating a prosecution must be deemed an acquittal for double jeopardy purposes just because the district court denominates it as such.

In *Sanabria*, the district court entered a judgment of acquittal on the basis of its finding that the indictment's description of the offense was "too narrow to warrant the admission of certain evidence" (*Sanabria* v. *United States*, *supra*, slip op. 13). The district court had not found that the indictment failed to charge an offense, as this Court noted (*ibid.*, citing *Lee* v. *United States*, *supra*). It was for that reason that this Court held that the ruling in *Sanabria*, like the ruling in *Fong Foo*, was properly deemed an acquittal. Because the district court's ruling in the present case constituted a determination that the indictment failed to charge an offense, the court's order was not an "acquittal," under *Sanabria* or *Fong Foo*, and those cases thus do not aid petitioners here.

2. Petitioner Bullock next asserts (Pet. 14-16) that even if the trial court's ruling terminating



the first trial was not an acquittal, a second trial should nonetheless be barred under the rule of *United States* v. *Jenkins*, *supra*.

In *Jenkins* this Court ruled that even if a midtrial dismissal of an indictment does not amount to an acquittal on the merits, further prosecution is barred if it is based on the ground that the defendant simply cannot be convicted of the offense charged, because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would [be] required * * *" (420 U.S. at 370). As petitioner Bullock recognizes, however, the decision in *Jenkins* was expressly overruled by this Court's decision last Term in *United States* v. *Scott*, *supra*. *Scott* makes it clear that the Double Jeopardy Clause poses no bar to a government appeal leading to a second trial in circumstances such as these (slip op. 14; citations omitted):

> Despite respondent's contentions, an appeal is not barred simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," * * * or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," * * *. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." * * * Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred

> only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to support a conviction." * * *

Although petitioner Bullock suggests (Pet. 16) that this Court reconsider and overrule its recent decision in *Scott*, he does not advance any consideration or persuasive reason that was not presented to this Court in *Scott* and rejected by it. He argues primarily that the constitutional policy against multiple trials is "necessarily threatened" by allowing the government another opportunity to convict after the first proceeding is terminated by a ruling favorable to the defendant. But "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice" (*United States* v. *Scott*, *supra*, slip op. 16). Here, petitioners moved to terminate the first trial because of "a legal claim that the Government's case against [them] must fail" (*id.* at 13). As this Court recognized in *Scott*, "[t]his is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact" (*ibid.*). These words are particularly apt in this case, since petitioners for reasons of trial tactics delayed until mid-trial a challenge to the indictment that could have been made before jeopardy had attached.[3]

[3] At oral argument in the court of appeals, petitioner's counsel stated that he waited until the close of the government's case to make his "motion for acquittal" because he wanted an opportunity to view the government's evidence (Pet. App. 72).



3. Petitioner Bullock contends briefly (Pet. 17) that reprosecution under Section 1006 was barred because Sections 657 and 1006 charge the same offense for double jeopardy purposes. While we believe that the Section 657 indictment and the Section 1006 indictment charged separate offenses under *Blockburger* v. *United States*, 284 U.S. 299 (1932), and *Brown* v. *Ohio*, 432 U.S. 161, 164 (1977), this contention is not necessary to the result in this case. The court of appeals proceeded on the assumption that the two indictments charged the "same offense" for double jeopardy purposes (Pet. App. 40-42) but held that reprosecution was not barred because there had been no acquittal or conviction on the Section 657 charge when the Section 1006 charge was tried. Of course, if the two indictments did charge different offenses for double jeopardy purposes, petitioners could have been convicted on the Section 1006 charge even if they were deemed to have been acquitted on the Section 657 charge.[4] But because the court of appeals properly ruled that petitioners were not acquitted on the Section 657 charge, the judgment in this case is correct regardless of whether the two indictments charged the same offense for double jeopardy purposes.

[4] Collateral estoppel would not have prevented the government from proving its case under Section 1006, even if the Section 657 termination had been deemed an acquittal, because the district court's order in the Section 657 proceeding resolved no material factual issues against the government.

4. Petitioner Kehoe concedes that under *Scott* the government could have appealed the district court's ruling terminating the first trial and, if successful, could have brought petitioners to trial a second time. Nonetheless, he argues (Pet. 6-8) that the Double Jeopardy Clause prohibits the government from bringing a second indictment without first succeeding on appeal from the order terminating the first proceeding.

This argument is clearly without merit. The district court held, and the government conceded on appeal, that the first indictment was fatally defective because it failed to allege an offense. Thus, an appeal from the district court's ruling would have been pointless. Rather, the proper course was to proceed anew under a valid indictment, as was done here. See *Lee* v. *United States, supra; Illinois* v. *Somerville, supra.* In *Lee,* for example, the defendant was tried under an information that failed to allege specific intent, an essential element of the offense. At the close of the evidence the trial court granted the defendant's motion to dismiss on that ground. The defendant was then properly indicted for the same crime and convicted. This Court held that, absent bad faith on the part of the judge or the prosecutor, the reindictment and retrial did not violate the Double Jeopardy Clause. In *Somerville* a mistrial was declared, over the defendant's objection, because of a similarly defective indictment. This Court upheld the defendant's conviction on reindictment and retrial. *Scott, Lee,* and *Somerville* demonstrate the fallacy in the contention



advanced by petitioner Kehoe: by requiring government success on appeal, it would bar all retrials caused by a correct midtrial determination that an indictment was fatally defective.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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